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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case on July 20, 1956.

OPINIONS BELOW

The opinion of the District Court (R. 20a–29a) is not officially reported (12 WH Cases 498). The opinion of the Court of Appeals (App. A, *infra,* pp. 23–31) is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 20, 1956 (App. A, *infra,* pp. 31–32). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the 1949 Amendments to Section 7 of the Fair Labor Standards Act were intended to expand the application of the *Belo* decision (*Walling* v. *Belo Corp.*, 316 U. S. 624) and to overturn this Court's other decisions which held that *Belo* was limited to agreements setting a bona fide realistic and actually operative rate, and that the Act did not permit the fixing by agreement of a wholly fictitious hourly rate completely unrelated to the pay actually and normally received by the employee for ordinary non-overtime hours.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U. S. C. 201, *et seq.*), are printed in full in Appendix B, *infra,* pp. 33–37.

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin respondent from violating the overtime requirements of the Act (Section 7). The charges of violations arose out of respondent's pay practices under "individual contracts" with approximately 600 of its employees working as insurance inspectors in respondent's 19 branches throughout the country. Respondent claims that the "contracts" in question are guaranteed weekly salary agreements in conformity with the terms of Section 7 (e), App. B., *infra,* p. 36.

1. Respondent is a Connecticut corporation engaged in the business of casualty insurance on steam boilers, pressure vessels and machinery of various types (R. 21a). Its principal place of business is in Hartford, Connecticut, and it has 19 branch offices located in large cities throughout the country (R. 13a). From 15 to 60 inspectors are employed at each of these branches, totaling approximately 600 (*Ibid.*). Prior to the enactment of the 1949 Amendments to the Fair Labor Standards Act the inspectors were employed at flat monthly salaries without regard to their actual working hours, and respondent, relying on its claim that the inspectors were exempt "administrative" employees under Section 13 (a) (1), made no pretense of compliance with the overtime requirements of the Act.[1] Respondent was definitely advised

[1] Section 13 (a) (1) exempts employees employed in a "bona fide executive, administrative, professional * * * capacity * * * (*as such terms are defined and delimited by regulations of the Administrator*)" [emphasis added]. The Administrator's regulations issued pursuant to this Section (29 CFR Part 541) prescribed five *conjunctive* requirements to qualify for "administrative" exemption, the following three of which are particularly pertinent to respondent's inspectors: (1) that the compensation be at a rate of not less than $75.00 per week, (2) that the employee's "primary duty" consist of performance of office or non-manual field work directly related to management policies or general business operations, and (3) that not more than 20 percent of the employee's weekly hours be devoted to activities which are not of an administrative character. During 1950 and 1951 a large proportion of respondent's inspectors did not meet the basic $75.00 salary requirement and respondent admitted that, even at the time of the pendency of this case on appeal, some of the inspectors still did not meet this requirement. In addition, the trial court in this case held the exemption inapplicable on the

by the Administrator in November 1948 that the inspectors did not meet the conditions which would qualify them for the "administrative" exemption (Transcript of evidence, pp. 11, 14). Although still claiming the exemption despite the Administrator's ruling, respondent apparently concluded that the same result could be obtained by using Section 7 (e) agreements (Tr. p. 12).

2. Shortly after the enactment of the 1949 Amendments, respondent executed with each inspector, separately, a standard form of agreement (R. 9a) which specified a "regular rate" of at least 75 cents an hour for the first 40 hours of work in any workweek and one and one-half times that rate for all hours worked in excess of 40, with a "guarantee" of "pay for 60 hours of work per week based on the rate specified," and which stated that the guaranteed pay would amount to a specified sum "per month" to be "paid twice a month on the Company's regularly established

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basis of findings of fact that none of the inspectors met the other two above-stated requirements (R. 21a, 24a–25a). These findings were supported by abundant evidence, and respondent did not cross-appeal.

Respondent may attempt, as it did in the Court of Appeals, to defend the judgment below on the ground that the inspectors were exempt, despite the District Court's ruling, under the "administrative" exemption. However, since the undisputed evidence shows that almost half of the inspectors had been receiving weekly salaries of less than $75.00, and even as late as the time of appeal respondent was admittedly paying some of them less than the requisite salary, the "administrative" exemption defense cannot support a judgment dismissing, in its entirety, a complaint which included all the inspectors, and not only those who were being paid the prescribed rate.

paydays" (R. 9a–10a). Along with the proposed agreement, respondent sent each employee a form letter explaining that it was proceeding pursuant to the Fair Labor Standards Amendments of 1949 and that the agreement "will assure you a guaranteed salary at least equal to that which you have been receiving or which has been agreed upon" (R. 11a).

To arrive at the "guarantee" and the hourly rate specified for each employee, respondent "translated the salary which they had been receiving to an hourly rate for 40 hours which, with time and a half for all time over 40 hours up to 60 hours, would give them the approximate salary, at least as much, if not a little more than the salary which they had been receiving and to which they had previously agreed." (See testimony of respondent's attorney, Secretary and Treasurer, Transcript, pp. 13–14.) The hourly rate and the "guarantee" for each employee was computed by taking the monthly salary he had previously received and translating that into a weekly "guarantee"[2] from which an hourly rate was then mathematically calculated on the basis of an assumed 60 hour workweek. This meant, of course, that the hourly rate had to be reduced to a figure small enough so that the "guarantee" would include "overtime compensation" for 20 hours per week. Although the actual hours required

[2] For example, the weekly "guarantee" of an employee previously paid $300 per month would be determined by multiplying by 12 months ($3,600) and dividing the results by 52 weeks which would give $69.24. The weekly guarantee might be slightly increased to a flat $70.00 as indicated in the illustration in the text *infra*, p. 13.

for the job differed radically from region to region and from inspector to inspector, the agreements were based on an assumed workweek of 60 hours indiscriminately for each of the inspectors, without regard to the hours actually worked by any of them.

3. In actual fact, most of the inspectors never exceeded or worked anywhere near 60 hours a week. As the trial court found, over a two year period the total number of weeks in which 60 hours was exceeded amounted to not more than one-fourth of one percent of all of the weeks worked (R. 20a). Since the total number was only 135 weeks out of approximately 58,000 man weeks (R. 5a), it is evident that well over two-thirds of the inspectors *never* exceeded 60 hours. A glance at the chart for all of the branch offices (R. 13a) shows that in many of the branches an actual workweek equalling 60 hours was almost as rare.[3]

The trial court also found (although obviously on the basis of only a rough estimate) that the inspectors' hours of work "typically" fluctuated "between 35 and 50 hours" (R. 20a). While a few inspectors in *some*

[3] In the Hartford branch where 32 inspectors were employed, no one ever exceeded 60 hours and there were *only two weeks* and *one week*, respectively, in which anyone worked as much as 60 hours. In the Los Angeles office where 18 to 20 inspectors were employed, there were *no* weeks exceeding 60 hours and a total of *only eight* and *three weeks* in 1950 and 1951, respectively, in which any employee worked as much as 60 hours. In the Chicago branch (which is the largest branch), with from 55 to 60 inspectors, there were only five workweeks in 1950 and *one* week in 1951 in which 60 hours was exceeded, and only nine and four weeks, in 1950 and 1951, respectively, in which anyone worked as much as 60 hours—a total of only 19 man-weeks, over the entire two year period, in which as much as 60 hours was worked in that branch.

of the branches may have frequently worked as much as 50 hours, the undisputed evidence shows that a large proportion of them rarely, if ever, worked in excess of 44 hours per week, and indeed that some of them rarely, if ever, worked more than 40 hours a week. This is illustrated by the chart for the Hartford branch (exhibit 3, R. 14a), which shows that over 93% of the total number of workweeks in 1950, and about 95% in 1951, were not in excess of 50 hours, and that 74% in 1950, and 78% in 1951, were not in excess of 44 hours, and that about 50% during the two years were not in excess of 40 hours.

The charts showing the average workweek of each individual inspector in the Hartford branch over the two year period (exhibit 4, R. 14a–17a) corroborate the fact that most of them rarely, if ever, had occasion to work more than 44 hours a week, and also show that the actual working hours differed substantially from individual to individual inspector. During 1950, the average workweek of different inspectors ranged from a low of 30.6 (employee Bilous) to a high of 50.2 (employee Fennessey)—an average difference of almost 20 hours a week (R. 16a). For the combined two years (R. 14a–15a), the average workweek of individuals ranged from a low of 31.7 hours (Bilous) to a high of 48.9 (Fennessey). During the combined two-year period, only 19 out of the 43 inspectors—less than half—worked an average workweek over 40 hours, only 8 of these worked an average over 42 hours, only 5 worked an average of over 44 hours and only 3 worked an average workweek over 46 hours,

with a single employee working as high as 48.9 hours, and none working as much as an average of 50 hours.

Nevertheless, all of these inspectors were regularly paid their semimonthly salaries supposedly for work-weeks of 60 hours, with a proportionate amount of their salaries arbitrarily labelled "overtime" compensation for 20 hours, whether they ordinarily worked no overtime at all, or worked no more than two to four hours overtime, or whether they frequently worked from six to ten hours of overtime, and despite the evident fact that in the normal course of the business their jobs rarely, if ever, required as many as 10 hours of overtime, much less 20 hours.[4]

REASONS FOR GRANTING THE WRIT

This case presents basically the same issue as in *Mitchell* v. *Brandtjen & Kluge, Inc.*, pending on petition for a writ of certiorari, No. 86, this Term. The reasons for granting review of this issue are quite fully set forth in our petition and reply memorandum filed in No. 86. The reply memorandum, having been filed subsequent to the Second Circuit's decision in the instant case, includes most of the grounds supporting the grant of the writ in the instant case. We there-

[4] A total of only 112 man weeks in 1950 (for 33 inspectors), and only 83 in 1951 (for 32 inspectors), exceeded 50 hours. (R. 13a, 14a). This would be an average of about two to three weeks per year per inspector, although, of course, many of the individual inspectors never worked as much as 10 hours overtime and therefore would not share the 112 weeks. Assuming that, for the most part, only a few individuals shared these 112 weeks, it is evident that at least two-thirds of the individual inspectors could have had little, if any, occasion to work more than 10 hours of overtime.

fore respectfully refer the Court to the petition and reply memorandum in No. 86 instead of repeating the grounds there discussed. Here, we shall only summarize these grounds with a view to emphasizing additional factors particularly applicable to the instant case.

I

In summary, the reasons advanced for the granting of the writ in No. 86 are as follows:

1. The decisions of the First and Second Circuits reduce the "bona fide" and "regular rate" requirements of Section 7 (e) to mere artificial and fictitious formalities, contrary to this Court's decisions prior to the 1949 Amendments (Pet. 10–13; Reply 3–4).

2. The ruling that Section 7 (e) is "self-sufficient" and eliminated this Court's post-*Belo* rulings is erroneous; it is contradicted not only by the very terms of Section 7 (e) but by the specific statutory provisions of other pertinent integrated amendments to Section 7—particularly the comprehensive definition of the term "regular rate" in 7 (d)—the applicability of which appears to have been overlooked by the circuits; it is also, significantly, contrary to the generally accepted understanding of the effect of Section 7 (e) immediately following its enactment (Pet. 12–16, 18; Reply 13–24).

3. Instead of considering the text and context of the pertinent amendments themselves, the circuit decisions rested primarily upon erroneous suppositions as to the legislative background against which the 1949 Amendments were enacted—suppositions which ig-

nored a most significant factor in that legislative background, *i. e.*, the prevalent and widely shared concern about the potentialities for abuse of *Belo*-type agreements if given unrestricted range, a concern voiced not alone by Department of Labor officials and labor representatives, but repeatedly by this Court's decisions to which Congress undeniably gave careful attention in drafting the amendments to Section 7 (Pet. 16–18; Reply 8–13).

4. The circuit court decisions are also premised on the mistaken assumption that the "regular weekly income" objective of Section 7 (e) would be impossible of attainment if employer and employee were not allowed unrestricted flexibility to fix arbitrary hourly rates without regard to employment actualities or to the basic statutory overtime policy. Contrary to this assumption, there is ample flexibility for wage agreements which provide a stable weekly salary "related, fairly, and not evasively, partly to regular hours of work and partly to overtime" (cf. concurring opinion of Mr. Justice Frankfurter in *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 433), within the limitations—such as we believe are imposed by Sections 7 (d) and (e)—designed to restrain abuse of wage agreements for purposes other than the attainment of the legitimate objective of wage stability (Reply, 24–28).

5. The importance of the issue is not only attested by this Court's pre-1949 decisions which emphasize that the "regular rate of compensation" is the "keystone" of the statutory overtime policy, but its sig-

nificance has greatly increased because of the widespread use in recent years of *Belo*-type agreements for thousands of employees, including almost every conceivable type and variety of worker who has occasion to work any substantial amount of overtime. The First and Second Circuit decisions discard the basic principles which had imposed reasonable restraints upon such agreements and which might have averted the outpouring of wholly artificial and evasive wage schemes that can now be expected to threaten practical nullification of the fundamental statutory overtime policy. This Court has not yet passed upon any overtime issues under this Act since the extensive amendments in 1949, and the issue presented by these cases is so crucial to the basic overtime policy of the Act that its determination should be settled by this Court (Pet. 18–20; Reply 3–8).

II

The facts of this case highlight the extent to which the First and Second Circuit decisions reduced the statutory terms "bona fide individual contract" and "regular rate" to meaningless formalities. As is evident from the testimony of respondent's own officer and attorney (see the Statement, *supra*, pp. 4–5), the wage agreements here have little, if any, relation to the objective of insuring employees a stable weekly salary, for they were receiving virtually the same regular salary prior to the execution of these agreements. This testimony, also, goes far toward showing that respondent's sole objective was to avoid the over-

time requirements just as completely as if its claim of the "administrative" exemption for inspectors had been allowed. While respondent might reasonably claim that the previous weekly salaries of *some* of the inspectors were intended to compensate for *some* overtime, this claim could not be substantiated at all for a large number of the 600 individuals involved, and it most certainly could not be substantiated for anything approaching 20 hours of overtime for the great majority.

From the manner in which the terms of the agreements were determined, it is apparent that the contract "regular rate" was computed "in a wholly unrealistic and artificial manner," with "no effort to base the regular rate upon the wages actually received or upon the hours actually and regularly spent each week in working," and that it "did not represent the rate which was actually paid for ordinary, non-overtime hours," and was "not in fact the regular rate under any normal circumstances" (*Walling* v. *Helmerich & Payne*, 323 U. S. 37, 41–42; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 424–426; see Reply in No. 86, pp. 12, 17). Instead, respondent, on a greatly exaggerated and more extreme scale, followed the same artificial and evasive scheme described in our reply memorandum in No. 86 (pp. 18–20). Since the agreements in the instant case are so much more extreme in their unreality, the inconsistencies with specific statutory requirements and the destructive impact upon the basic overtime policy can be better appreciated by illustrations based on the facts of this case.

As pointed out in the Statement (*supra*, pp. 7–8), a large proportion of the inspectors rarely, if ever, worked in excess of 44 hours. An illustration will show how respondent's 60 hour agreement with such an employee, far from imposing any "financial pressure" to spread employment in times of recession, operates as an inducement to increase and aggravate any chronic unemployment problems that may arise (cf. Reply in No. 86, pp. 26–28). Such an employee may have previously received a monthly salary which averaged $69 per week. Since he was paid this amount regularly for workweeks which in the normal course of the business have not exceeded 44 hours, he would actually have been receiving a regular hourly rate of at least $1.50—$60.00 for 40 hours straight time ($1.50 x 40) plus $9.00 for 4 hours of overtime ($2.20 x 4), a total of $69.00. Under respondent's present agreement, this employee might be guaranteed $70.00 for a workweek of 60 hours, with a reduction of his hourly rate from $1.50 to $1.00, and a corresponding reduction of his overtime rate of $1.50, instead of $2.25—$40 for 40 hours straight time ($1.00 x 40 hours) plus $30 for 20 hours "overtime" ($1.50 x 20 hours), a total of $70. Thus, respondent is enabled to avoid any cost whatsoever for 16 additional hours of overtime per week and to cut the cost of any overtime in excess of 60 hours down to the *actual* regular rate of $1.50. In this way, the employer can actually save $36.00 ($2.25 x 16 hours) on any occasion that he may wish to call on the employee to work 60 hours, or he can save $24 ($1.50 x 16 hours) that he might have to

pay another employee at the actual straight-time rate.[5]

It is evident that, under such agreements, respondent has not included in the specified "regular rate" a substantial part of the remuneration actually and regularly paid for the inspectors' normal non-overtime working hours, as specifically required by Section 7 (d). See the Reply Memorandum in No. 86, pp. 15–21. The agreements have excluded from the contract "regular rate" not merely "payments made for occasional periods when no work is performed" (to which the exclusion in Section 7 (d) (2) is limited), but have excluded substantial payments regularly made, supposedly for 16 or more unworked hours. Even in the case of the inspectors who may have frequently worked more than 44 hours, it is plain that in most of such cases the contract "regular rate" excluded payments regularly received, supposedly for at least 10 unworked hours. Thus, the agreements clearly do not meet the "regular rate" requirement of Section 7 (e), if, as the plain statutory terms provide (see Reply in No. 86, p. 14), the definition in Section 7 (d) is applicable. And, if the term "bona fide individual con-

[5] While this illustration does not precisely correspond to the situation of any particular employee, it is close enough to an actual situation fairly to reflect the effect of the agreements with the large proportion of inspectors who rarely, if ever, have worked in excess of 44 hours per week. Because the figures for particular individual employees are not in the record, and also in order to simplify the mathematics, we have used hypothetical rather than actual figures. The evidence in the record, although it does not include specific figures for particular employees, does show the frequency of weekly hours worked at various levels and the average workweeks of particular employees, at the Hartford branch (Exhs. 3 and 4, R. 14a–17a).

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tract" has any real meaning, it is equally evident that this requirement of Section 7 (e) has not been met by respondent's agreements. For the indiscriminate, arbitrary allocation of a portion of the weekly salary to 20 hours of "overtime," despite the wide differences in the actual working hours of these 600 individual employees, was not done on any "bona fide individual" basis.

III

The wage agreements in the instant case, unlike those in *Brandtjen,* No. 86, which were 48 hour agreements, employed the maximum 60 hours limitation provided by Section 7 (e) (App. B, *infra,* p. 36). Thus, this case presents a question not specifically ruled upon by the *Brandtjen* decision, *i. e.,* whether the 60 hour proviso was intended to validate any agreement, however fictitious and however unnecessary for the attainment of the objective of a regular weekly income, as long as the agreement was kept within 60 hours—or, as we believe, was simply intended as an additional limitation upon agreements setting bona fide, and actually operative, regular and overtime rates.

While the First Circuit in *Brandtjen* did not specifically rule on this question, the decision below was the logical outcome of the First Circuit's ruling that the "bona fide individual contract" and the "regular rate" requirements of Section 7 (e) are "self-sufficient" and are satisfied by the mere formality of specifying an hourly rate mathematically consistent

with the amount of the weekly guarantee and the number of hours arbitrarily assumed. The effect of this interpretation of Section 7 (e) is, of course, an open invitation to agreements arbitrarily allocating the weekly salary to the maximum of 60 hours, regardless of the actual range of irregularity of hours necessitated by the work—whether the actual fluctuation is usually only between 32 and 42 hours (as it appears to have been in *Brandtjen*), or only up to 44 (as was evidently the case with a large proportion of the inspectors in the instant case), or between 20 and 100 to 150 (as was the case in *Walling* v. *Halliburton Co.*, 331 U. S. 17).

This interpretation of the 60 hour proviso obviously cannot be rationalized on the basis of the limited objective of Section 7 (e) to make possible a regular weekly salary where the employee's duties "necessitate irregular hours of work." For it is quite unnecessary, for purposes of providing a regular weekly salary for hours of work which do not usually fluctuate above 42 or 44 hours, to assume that the weekly salary covers 60 hours.[6] As pointed out in our Reply

[6] If a wage agreement may in effect convert the 40 hour workweek standard into a 60 hour standard before any true overtime compensation is paid, *regardless of the degree of fluctuation* of hours necessitated by the work, the 40 hour workweek standard would be virtually abolished. For, as pointed out in petitioner's reply memorandum in No. 86 (pp. 6–7), virtually every conceivable type of worker who has occasion to work any substantial overtime, can easily qualify as an employee whose "duties * * * necessitate irregular hours of work." That Congress did not intend to thus abolish the 40 hour workweek standard is not only evident from its persistent adherence to the standard through

in No. 86 (pp. 24–28), it is possible and practicable for the employer to adapt the weekly wage, "fairly and not evasively," to the actual fluctuations in working hours required by the usual course of his business. And this, we submit, is what is required by the terms of Section 7 (e) and the other related integrated amendments to Section 7, as well as by the legislative intent to restrict abuse of such agreements for purposes other than the legitimate objective (see Reply in No. 86, pp. 13–28).

The legislative background also indicates that the 60 hour proviso was designed, not as an invitation to fictitious and evasive agreements, but rather to impose a further limitation on an otherwise valid *Belo*-type agreement. The attention of Congress had been called to this Court's decision in *Halliburton, supra,* upholding the validity of a *Belo*-type agreement which provided a weekly guarantee covering *84 hours* for oil field employees whose hours fluctuated to as high as 140 and 150 a week and who were frequently paid more than the weekly guarantee. See Senate Hearings before Subcommittee of the Committee on Labor and Public Welfare, Fair Labor Standards Act Amendments of 1949, 81st Cong., 1st Sess., p. 23. There is nothing in the legislative history to indicate that adoption of the 60 hour limitation had any purpose other than to limit that decision, in response to criticism that the agreements there upheld illustrated the

all the intervening years even during the wartime period when there was no unemployment problem (see Pet. in No. 86, pp. 16–17), but is confirmed by recent proposals to reduce the workweek even further to 35 hours or 4 days in order to meet unemployment problems that might result from automation.

extremes to which *Belo*-type contracts could be carried even under the pre-existing limitations. To interpret this proviso as a repeal of all other pre-existing limitations is a distortion of its specific purpose.

Respondent's interpretation of the 60 hour limitation apparently stems from the erroneous supposition that Section 7 (e) was the outcome of conflicting proposals which included proposals to *expand* the *Belo* decision. But, as pointed out in our Reply in No. 86 (p. 10), the conflicting views did not pose the alternative of *expanding* the *Belo* decision, but at most simply of *preserving* its existing status.[7]

IV

Respondent's primary reliance in the court below upon the omission from Section 7 (e) of certain limitations proposed by the "Lesinski bill" (H. R. 5856) reflects a basic misapprehension as to the history of the Section 7 amendments as enacted. The contention is that since the Lesinski bill contained a

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[7] In this connection, it is noteworthy that the attorney for a large insurance company, engaged in the same type of business as respondent, was among those, who shortly after the enactment of Section 7 (e), specifically expressed the view, in a widely circulated publication, that the 1949 Amendments did no more than approve agreements under the same conditions upheld in the *Belo* case, leaving them subject to the same limitations. See *A "Belo" Primer for 1950*, by William Conant Brewer, Jr., Labor Law Journal, November 1949, p. 94. After reviewing at length the court decisions bearing on *Belo*-type contracts, the author concludes (at p. 160):

"In the *Belo* case, the guarantee was exceeded in about twenty percent of the weeks worked. The court looked upon this as evidence of good faith in the setting of the regular rate, *and it is unlikely that a guarantee which is never exceeded will be upheld, even under the statute.*" [Emphasis added.]

limitation specifically requiring that the number of hours covered by the weekly guarantee should bear "a reasonable relationship to the range of hours customarily worked during a representative period of time," the abandonment of the Lesinski bill in favor of the "Lucas bill" was tantamount to a rejection of this limitation. There are two basic fallacies in this argument.

In the *first* place, the provision of the Lesinski bill related to contracts providing an "hourly rate of pay;" it did *not* use the term "regular rate of pay" and thus did not incorporate the definition of that term as contained in the present Section 7 (d). (The Lesinski bill provision was numbered Section 7 (c) and preceded the subsection defining the term "regular rate.") Since the Lesinski bill used only the term "hourly rate of pay," it was necessary to spell out the details of the limitations governing the agreed hourly rate. On the other hand, the more concise Section 7 (e) of the Lucas bill was placed immediately following the definition of the term "regular rate," and since it used the specific term which had already been comprehensively defined in the preceding subsection (d), there was no need for the detailed language of the Lesinski bill. For, as we have shown in the Reply Memorandum in No. 86 (pp. 14–24), the requirements of Section 7 (d) necessarily include the limitation of a reasonable relationship to the employee's actual working hours.

In the *second* place, the replacement of the Lesinski bill reflects no specific legislative intent with respect to this one provision. Both bills were lengthy, compre-

hensive bills, comprising some 40 pages or more, and containing numerous amendments to the Fair Labor Standards Act, including, *inter alia,* amendments to the minimum wage and coverage provisions and to numerous exemption provisions. The Section 7 provision was simply one section of the lengthy bills. Whatever basis there might have been for inferring a specific purpose to reject limitations in Section 7 (c) of the Lesinski bill if the two bills had been concerned solely or primarily with that particular provision, the substitution of the whole Lucas bill for the equally general all-inclusive Lesinski bill is, of itself, hardly indicative of the specific intent which respondent infers with respect to this one provision. And the legislative debates, far from showing that the substitution had any significance so far as Section 7 (e) is concerned, negative respondent's contention. This is evident not only from Congressman Lucas' own statement of the limited scope of Section 7 (e) (see Pet. in No. 86, pp. 13–14), but also from the complete absence in the lengthy debates on the entire bill of any suggestion, from anyone, that an expansion of the *Belo* decision was contemplated. Thus, in explaining the differences between the two bills, Representative Lesinski emphasized only the differences in coverage and minimum wage provisions, and did not even mention the differences in the provisions relating to *Belo*-type contracts. (95 Cong. Rec. 10998, *et seq.*). The ensuing general debate emphasizes that the differences between the two bills to which Congress attached significance were, not the differences in the *Belo* provision, but the differences in coverage, mini-

mum wage, various exemptions, rule-making power, and in fact, almost everything *except* the difference in the provisions on *Belo*-type contracts.

Under these circumstances, the mere substitution of the Lucas bill with its more general phraseology of the *Belo* contract provision—a provision which in itself provoked virtually no discussion—can scarcely be regarded as evidence of Congressional rejection of the more detailed safeguards (based on this Court's decisions subsequent to *Belo*) spelled out in the corresponding provision of the Lesinski bill. Such an inference is particularly unwarranted in view of the retention in Section 7 (e) of the terms "bona fide" contract and "regular rate of pay" which are the terms construed by the very precedents which the decision below assumes Section 7 (e) repudiated by implication.

CONCLUSION

In view of these considerations, together with the reasons set forth in the petition and reply memorandum filed in No. 86, we respectfully submit that the petition should be granted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

IRVING J. ALTER,
Attorney,
Department of Labor.

OCTOBER 1956.